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No. 06-1113

In The

Supreme Court of the United States

Thomas R. Buchanan,
Petitioner,

v.

United Parcel Service, Inc. and
International Brotherhood of Teamsters, Local 41,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF TEAMSTERS LOCAL 41 IN OPPOSITION

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Statement of the Case

1. Thomas R. Buchanan, a lawyer practicing in Kansas City, has asked this Court to grant a writ of certiorari to consider sanctions imposed on him for violating rules governing summary judgment practice when he submitted a 480-page opposition memorandum containing repeated misstatements of the record evidence, factual assertions without bases in that record, and extended argument in portions of the document reserved for recitation of facts. Pet. App. 9. The opposition substantially retarded the summary judgment process thereby warranting sanctions.

Mr. Buchanan filed the offending document on behalf of Stephen E. Jones and Doyle Clark as plaintiffs in a hybird § 301/DFR action they brought against their employer United Parcel Service and their union International Brotherhood of Teamsters, Local 41 in the United States District Court for the Western District of Missouri. After affording Mr. Buchanan notice and an opportunity to respond, pet. app. 27-28, the trial judge sanctioned him $1,000.00 for violation of Fed.R.Civ.P. 11, pet. app. 19. UPS and Local 41 also filed motions for relief under 28 U.S.C. § 1927 on the grounds that Mr. Buchanan's filing of the opposition memorandum "multiplie[d] the proceedings" causing them to incur excessive attorney fees. The trial judge granted those motions and awarded each of them $10,000.00. Pet. App. 26. Mr. Buchanan appealed all of the sanctions, and the United Stated Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1-11.

Mr. Buchanan argues here that he was not given adequate notice of the conduct for which he was being sanctioned, questions 1 and 2, and that the lower courts' rulings failed to sufficiently identify the bases for the sanctions, question 3. The record is otherwise. The trial judge specifically pointed to the portions of the summary judgment opposition

dealing with the facts of the underlying case as being grossly defective and provided specific examples. Pet. App. 27-28.[1] Likewise, the motions for relief under § 1927 defined the problems with the briefing and offered numerous examples. In their rulings, the trial judge and the court of appeals more than adequately defined the violations of Rule 11 and § 1927. Mr. Buchanan was afforded due process in all respects and at all levels.

Mr. Buchanan also argues that sanctions imposed under § 1927 require a finding of subjective bad faith and suggests a circuit-split on this point, question 4. Settled law, however, does not support that contention in either respect. As discussed below, the Ninth Circuit's standard for sanctions under § 1927 is functionally the same as the one the Eighth Circuit applied here. *See Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) (sanctions may be imposed under § 1927 for conduct that, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.") (internal quote omitted); *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) ("[R]ecklessness suffices for § 1927, but bad faith is required for sanctions under the court's inherent power."). Neither court of appeals requires a finding of bad faith.

In sum, the petition presents neither an issue of remarkable importance to the legal community nor a bona fide division among the circuits on a substantial point of federal

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1/The trial judge's show cause order incorporates his detailed discussion of the deficiencies of the opposition papers appearing in his rulings on summary judgment. Mr. Buchanan has not included those rulings in the appendix. But Messrs. Jones and Clark have filed a separate petition for writ of certiorari on the judgment entered against them in the underlying case. *Jones and Clark v. United Parcel Service, et al.*, Case No. 06-1099. The ruling appears in the appendix to Jones and Clark's petition. App. 30-79. The trial judge's discussion of the failings of the opposition memorandum appears at app. 31-37.

law.

2. In the underlying action, Jones and Clark argued that they had been wrongfully terminated from their jobs with UPS and that Local 41 failed to adequately represent them in the grievance process provided in the collective bargaining agreement between the union and company. This is commonly known as a hybrid § 301/DFR action.[2] *See generally, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71(1976); *Vaca v. Sipes*, 386 U.S. 171, 190-95 (1967) (recognizing and discussing hybrid claims). Jones and Clark brought a variety of discrimination claims against UPS alone. The record established that Local 41 pursued grievances challenging the terminations through every available step of the process provided in the CBA, presented evidence on behalf of Jones and Clark, and allowed each of them speak at length in their own defense at the grievance hearings. Despite that evidence, including transcripts of the final grievances hearings, Jones and Clark claimed they were inadequately represented because of intra-Local politics. The trial judge granted summary judgment to Local 41 and UPS. The court of appeals affirmed.

In response to the summary judgment motions and supporting memorandums, Mr. Buchanan crafted a book-length opposition that ignored or mischaracterized the factual record and freely mixed argument and presentation of the purported facts. The offending character of the opposition is difficult to capture in the abstract. Its offensive quality

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2/Breach of a labor contract gives rise to a violation of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. And a union's legally inadequate handling of a member's grievance violates the judicially imposed "duty of fair representation." Hence, a union member's cause of action requiring proof of both has become known as a § 301/DFR claim.

gives credence to the adage that seeing is believing. Both the trial judge and the court of appeals had that opportunity and were united in the conclusion that the document could not be reconciled with the governing court rules or a lawyer's duty to the tribunal.

The opposition memorandum began with 168 pages of additional "facts" to be considered on summary judgment presented in 948 paragraphs. The memorandum then took 179 pages to respond to the fact statements in the Defendants' summary judgment papers. And the document concluded with 132 pages of argument. Pet. App. 2-3. But the offending character of the opposition lay not so much in its length as its failure to conform to either the accepted rules for summary judgment papers or the factual record of the case. The court of appeals described the opposition as studded with "unsupported attempts to controvert facts (including misstatements and mischaracterizations of the record), failures to provide citations to the record, improper use of cross-references, and inappropriate inclusion of legal argument in a purported listing of undisputed facts[.]" Pet. App. 9. To be sure, the problems the opposition created escalated measurably because of its length – the deficiencies instead of being confined to a document of 10 or 20 pages - were spread across nearly 350 pages. Id.

3. In his decision granting summary judgment on Clark's claims, the trial judge provided a detailed description of the failings of the opposition. *See Jones and Clark v. United Parcel Service, et al.*, Case No. 06-1099, pet. app. 31-37. The trial judge cited half a dozen examples of the problems that plagued the entire opposition and clearly explained they were illustrative rather than exhaustive. Id. at 34 ("[T]he Plaintiffs' 948 paragraph Fact Statement contains numerous and egregious misrepresentations and misstatements. In an effort to illustrate the appalling nature of these representations, the Court offers some examples."), id. at 35

("[T]he occurrences are far too numerous to list here[,] and, therefore, the Court will be forced to offer examples to demonstrate these violations.")

The trial judge, simultaneous with the entry of summary judgment for the Defendants, issued an order to Mr. Buchanan to show cause why he should not be sanctioned under Rule 11 for the defects in the opposition papers. Pet. App. 27-28. The trial judge directed the response be filed within 15 days and be limited to 10 pages. Id. The trial judge acted on his own initiative rather than in response to a motion from either UPS or Local 41. Mr. Buchanan responded to the show-cause order by discussing in detail the *examples* the trial court offered, but never really offered an explanation for the overall character of the briefing. Mr. Buchanan omits his response from the appendix to this Court. The trial judge imposed a $1,000.00 sanction on Mr. Buchanan and in doing so again outlined the overall problems with the opposition memorandum. Pet. App. 12-19. The sanctions were intended as a penalty to deter repetition of the offending conduct.[3]

Following the entry of the show-cause order, UPS and Local 41 both filed motions under § 1927 to recover excessive attorney's fees they incurred in preparing reply briefs to the summary judgment opposition because of its deficient character. In those papers, the Defendants outlined additional examples of the problems with the opposition. Mr. Buchanan filed responses to those motions. Pet. App. 20-21(order referring to the motions and response). The trial judge granted those motions in part; he found Mr. Buchanan liable under § 1927, but awarded sums less than UPS and Local 41 had requested. Pet. App. 24-26. Each

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3/In conformity with Rule 11, Mr. Buchanan was directed to pay the sanction to the Clerk of the Court.

defendant was awarded $10,000. Pet. App. 26.

Mr. Buchanan appealed the Rule 11 sanctions and the awards under § 1927. The court of appeals affirmed the trial judge's decisions in their entirety. Pet. App. 1-11.

Both courts readily (and understandably) found the opposition to be in violation of Rule 56.1 of the Local Rules for the U.S. District Court for the Western District of Missouri. Pet. App. 2; *Jones and Clark*, pet. app. 37. The local rule, *Jones and Clark*, pet. app. 139-40, requires facts presented on summary judgment to set forth concisely with specific references to the supporting evidentiary record. And any opposition to the facts must likewise be succinctly stated and referenced in the evidence. The opposition also ignored the spirit, if not the letter, of Fed.R.Civ.P. 56, which requires the evidence offered be of the type that would be admissible at trial. Thus, statements without foundation in the record cannot establish a basis for granting or denying summary judgment.

Argument

1. This Case Fails to Meet the Criteria for Review. Review on certiorari and the concomitant investment of this Court's time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, that sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of ap-

peal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006) (certiorari granted to resolve circuit split); *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (certiorari granted to answer important question of law); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (important question of law).

Mr. Buchanan's petition presents neither a legitimate circuit split nor an issue of marked importance. Three question presented in the petition all revolve around nebulous due process claims arising from the supposed lack of specificity in the trial judge's orders and the court of appeals' affirmance. The final question, as noted, rests on an insupportable claim of a circuit-split on the standards for imposing awards under § 1927.

2. The Lower Court Proceedings Afforded Mr. Buchanan Due Process. Mr. Buchanan suggests he was deprived of adequate notice as to his offending conduct in submitting the summary judgment opposition despite the trial judge's description of the deficiencies in light of the governing court rules and the illustrative examples culled from the 480-page brief. The rulings, however, more than adequately outlined the nature of the court's concern. Rather than address the reason for the essential failure of the opposition, Mr. Buchanan sought to acquit himself by trying to explain away the individual examples cited in the rulings. But, of course, that missed the fundamental point. In turn, Mr. Buchanan never explained why he filed an opposition that repeatedly failed to comport with the basic requirements for citing to record evidence and doing so accurately. And he has yet to do so – no such explanation appears in his petition.

Due process, in the constitutional sense, is an extraordi-

narily malleable concept intended to provide fair notice under the circumstances before a party can be deprived of a protectable interest. *See generally, Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312 (1992) ("'notice' or 'fair warning'" often referred to as "the analytical touchstone of due process"); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (due process satisfied through notice "reasonably calculated, under all the circumstances to apprise interested parties" of the contemplated action). This Court has described the protection this way: "Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

In this case, the Local Rule combined with the trial judge's description of the defects in the summary judgment opposition afforded Mr. Buchanan with adequate notice of the contemplated basis for the proposed Rule 11 sanctions. And the motions of UPS and Local 41 for relief under § 1927 similarly informed him of the basis for those requests.

Mr. Buchanan implicitly would require a court sanctioning under Rule 11 or a party seeking a § 1927 award to list each and every individual defect in an offending document in a show-cause order or motion. That is not required. What is required is fair notice – a sufficient description of the alleged problems to permit a response. Mr. Buchanan received that notification. Moreover, he could review the opposition to refresh is recollection as to which factual assertions were not cited to the record and which were inaccurately cited. He could, upon reviewing the document, also readily identify the extended legal arguments injected into the portions of the brief that were supposed to be confined to factual representations. Contrary to Mr. Buchanan's refrain, he was not required to respond to "an

invisible and moving target." Pet. 9, 11. At 480 pages, his opposition was hardly invisible and it did not change any once it was filed.[4] Mr. Buchanan was not left to guess about what the trial court viewed as the rules violations. He chose to avoid addressing the overarching problem with the opposition – perhaps because there is no legitimate explanation for so deviant a brief – in preference to discussing only the cited examples of that problem.

In addition, the Buchanan approach would, if accepted, build in a certain perverse burden on a court considering sanctions. Descriptive identification of the defects would be insufficient. Rather, the court would have to go through the document line by line and list every instance that a rule had been violated. The more noncompliant a brief, the greater the burden on the trial judge to issue a proper show-cause order under the Buchanan doctrine.

Due process, however, does not require that sort of micro-notification to give a party fair warning. *See, e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997) (In the criminal context, fair warning requires that a person need not "guess" about the prohibited conduct.). Mr. Buchanan was sufficiently informed of the defects in the briefing. The cases Mr. Buchanan cites do not require more than the notice he received here. Essentially, they preclude a court from sanctioning a lawyer without any notice or for conduct not

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4/A wag might also point out that if the target truly were invisible, Mr. Buchanan would have no way of knowing whether it was moving or not. This sort of rhetorical illogic cannot gloss over the fundamental flaw in Mr. Buchanan's position. The defects in his opposition were patent – missing and inaccurate cites are apparent, as is the (improper) interspersing of argument with fact statements.

embraced in the show-cause order.[5] Pet. 10. Here the show-cause order described the improper conduct, and the trial judge imposed the sanctions for that conduct – nothing more and nothing less. The "specific conduct" language of Rule 11(c)(1)(B) is not otherwise. It prohibits sanctions for generically described litigation abuses that fail to identify particular conduct or a particular submission.

Mr. Buchanan further complains that his response to the trial judge's show-cause order was limited to ten pages, depriving him of an opportunity to be heard. But Mr. Buchanan fails to demonstrate how that unfairly deprived

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5/ In *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 389 (2d Cir. 2003), the court of appeals reversed sanctions imposed when the notice referred to deficiencies in the defendant's answer, but the sanctions order relied upon a letter never mentioned in the answer. The other grounds largely entailed sanctions for legal arguments that could have been viewed as seeking changes in existing law – a nonfrivolous position. Here, of course, the notice and the sanctions focused on those portions of the summary judgment opposition addressing the facts of the case. In *Martens v. Thomann*, 273 F.3d 159, 178-79 (2d Cir. 2001), the court of appeals found a complete lack of notice to counsel regarding possible sanctions and suggested in dicta that adequate notice could include reference to allegedly unsupported assertions in the pleadings. Similarly, the court of appeals reversed Rule 11 sanctions in *Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000), because the trial judge failed to issue a show cause order before acting. The appellate court did not discuss what might constitute specific notice in any given circumstance. In *Thornton v. General Motors Corp.*, 136 F.3d 450, 454 (5th Cir. 1998), the court of appeals reversed Rule 11 sanctions because the show-cause order the trial judge issued following summary judgment briefing appeared to question the evidence submitted in opposition to the motion, but counsel was ultimately sanctioned for failing to conduct an adequate investigation before filing suit – something not mentioned in the show-cause order. Finally, *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996), simply stands for the unremarkable proposition that notice and an opportunity to be heard *after* Rule 11 sanctions have been imposed fails to comport with the required procedural process.

him of the chance to respond. First, he does not suggest here what else he would have said to the trial judge. Nor did he make such a proffer to the court of appeals. Second, Mr. Buchanan's response to the § 1927 motions was not so limited. The trial judge plainly considered the Rule 11 sanctions and the § 1927 awards in tandem. The orders were entered the same day. Pet. App. 19, 26. And the trial judge specifically refers to the § 1927 awards as a factor shaping the size of the monetary penalty he imposed under Rule 11. Pet. App. 18. The trial judge reviewed the entire briefing in reaching his conclusions, not just the 10 pages Mr. Buchanan submitted in response to the show cause order. Even if there were due process implications to the page limitation on the Rule 11 response (though there actually are not), Mr. Buchanan suffered no prejudice because the whole of his rejoinder to the § 1927 motions was before the court, as well.

Finally, on the due process front, Mr. Buchanan contends neither the trial judge nor the court of appeals described with sufficient particularity the bases for their rulings on the sanctions. The purported lack of specificity by Mr. Buchanan's reckoning deprives him of meaningful judicial review and, thus, due process. He cites no authority to support his supposition.

The trial judge's Rule 11 order describes the problems with the summary judgment opposition with sufficient clarity to allow appellate review. Pet. App. 15-16. The court of appeals indicated no difficulty in reviewing the trial judge's decisions on the sanctions or the § 1927 motions for want of a description of the deficiencies and indicated no desire for more detailed findings. The court of appeals is hardly reticent to point out shortcomings in a trial judge's findings. *See, e.g., Darst v. Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority*, 339 F.3d 702, 712 (8th Cir. 2003); *Collins v. Henderson*, 180 F.3d 988, 990 (8th Cir. 1999).

The court of appeals also had the summary judgment opposition along with the supporting evidentiary materials before it in the record on appeal. The court of appeals, therefore, could assure itself of the character of the opposition by reviewing the record. And in his appellate brief, Mr. Buchanan was free to offer whatever explanation he deemed appropriate about the reasons the summary judgment opposition turned out the way it did.

3. There is No Circuit-Split on the Standard for § 1927 Relief. In his final issue, Mr. Buchanan contends the Ninth Circuit requires subjective bad faith on the part of counsel to warrant an award of fees under § 1927. Pet. 16. He cites *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983), for this proposition. But that case does not so hold, and the Ninth Circuit has since specifically recognized that an award under § 1927 requires only objectively reckless conduct. *Fink*, 239 F.3d at 993.

In *Blodgett*, the court of appeals stated that § 1927 requires a finding that "counsel acted 'recklessly or in bad faith[.]'" *Blodgett*, 709 F.2d at 610 (quoting *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982)). The court of appeals recognized that either reckless conduct or conduct undertaken in bad faith would justify an award. The opinion, thus, noted two sufficient conditions, but did not explicitly define the minimally necessary condition. The court of appeals reemphasized the sufficiency of reckless conduct in *Fink*, 239 F.3d at 993, stating: "[R]ecklessness suffices for § 1927[.]" In *Fink*, the court of appeals sought to eliminate some ambiguity that had crept into circuit precedent on the question and, thus, spoke with care and deliberation.

The Eighth Circuit similarly holds that reckless conduct will support an award under § 1927. *Tenkku*, 348 F.3d at 743; *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir. 1990) ("The

standard under § 1927 . . . is whether the attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (quoting *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc)). Mr. Buchanan attempts to suggest otherwise in his petition. His reliance on *NAACP v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990), is misplaced. The *Atkins* panel suggested that § 1927 might include a "bad faith" component, but the facts of the case did not require resolution of that issue. In that case, the court of appeals held that the trial judge did not abuse his discretion in finding the lawyer's actions to have been objectively reasonable, rendering an award under § 1927 inappropriate. The court of appeals specifically noted that, as a result, it did not need to make any further inquiry, i.e., determining whether subjective bad faith was a necessary condition for an award.[6]

The Eighth Circuit, however, has since directly addressed the standards for imposing awards under § 1927 in *Tenkku*, *Perkins*, and other cases and has held that reckless conduct is enough. In sum, Mr. Buchanan fails to demonstrate any substantial disagreement among the circuits on this point.

The settled law recognizes that recklessness is sufficient to satisfy Rule 11. *See, e.g., Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 40 (1st Cir. 2005); *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) ("standard of objective reasonableness" governs Rule 11

6/The *Atkins* Court relied on a footnote in an earlier case for the notion that § 1927 might require a showing of bad faith. *Atkins*, 908 F.2d at 340. But the prior case also made only passing reference to that possibility and specifically withheld any ruling on the point. *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 n.2 (8th Cir. 1987) ("Whether [§ 1927] requires a finding of bad faith is a question that is not before us.").

sanctions). To employ a "bad faith" requirement for § 1927 sanctions would create differing standards for Rule 11 and § 1927, even though the two provisions operate in a complementary manner to fully redress sanctionable attorney conduct. When a court acts on its own motion in response to a lawyer's conduct, it may not award attorney's fees to the opposing party under Rule 11. *Norsyn*, 351 F.3d at 831. The court, however, may impose an economic penalty, in the form of a dollar amount paid to the clerk, combined with nonfinancial conditions designed to prevent repeat conduct, such as requiring the offending lawyer to attend legal education seminars. Rule 11, thus, is a forward-looking measure aimed at affecting future behavior. In contrast, § 1927 is designed to remedy the financial impact of the improper conduct on the other parties to the action by allowing them to recover from the offending lawyer an amount equal to the excess legal fees they were required to pay their own lawyers because of that conduct. Thus, § 1927 essentially looks back to ameliorate a financial harm. Together, Rule 11 and § 1927 provide a complete remedy that both seeks to prevent future harm and corrects for past harm. Accordingly, they logically should be governed by substantially the same objective standard.

Conclusion

The petition for writ of certiorari should be denied for want of a question of substantial importance or a genuine division among the circuit courts of appeal.

Respectfully submitted,

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